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CHARLES ELMORE

No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

To The Honorable Supreme Court of the United States:

I.

REPORT OF OPINIONS DELIVERED BY THE COURTS BELOW.

The majority and dissenting opinions of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas are published under the style of Bain Peanut Company of Texas vs. Pinson & Guyger in 19 S. W. (2nd) 203. There is no official report of those opinions. The Texas Supreme Court wrote no opinion in declining jurisdiction of the case.

II.

JURISDICTION.

Appellants have complied with paragraph 1 of Rule 12. Appellees have moved to dismiss for want of jurisdiction, and appellants have replied thereto. Further discussion of the Court's jurisdiction is therefore omitted.

III.

STATEMENT OF THE CASE.

Appellees, as plaintiffs, sued Bain Peanut Company of Texas, as defendant, in the District Court of Comanche County, Texas, for damages for breach of contract. Plaintiffs alleged that Bain Peanut Company of Texas was

> "a private corporation duly incorporated and doing business under the laws of the State of Texas, with its principal office and place of business at Fort Worth, in Tarrant County, Texas." (R. 1)

Defandant presented a statutory motion for change of venue to Tarrant County, Texas, designated as a plea of privilege under the Texas practice; and, subject thereto, filed a general demurrer and denial. (R. 3). Plaintiffs controverted the plea of privilege and sought to maintain venue in Comanche County solely upon the allegation that

> "the defendant is a private corporation and this cause of action arose in Comanche County, Texas, and the venue of this suit is properly laid in Com-

anche County, Texas, on account of such facts." (R. 4).

Proof of that allegation brought the case within Subdivision 24, Article 1830, Revised Civil Statutes of Texas (now Subdivision 23, Article 1995, Revised Civil Statutes of Texas), with respect to venue of the suit. The portion of said statute involved in this appeal reads:

> "Suits against a private corporation, association or joint stock company, may be brought in any county in which the cause of action or any part thereof arose."

Defendant demurred generally (R. 6) to plaintiffs' controverting affidavit, which demurrer the trial court overruled, thus denying the change of venue to defendant, and defendant duly excepted, (R. 6-7). Upon a jury verdict, the court rendered judgment against defendant for $6,805.40 with interest from date. (R. 7-8).

By an assignment of error in the trial court (R.8) defendant challenged the constitutionality of the quoted portion of Subdivision 23, Article 1995, Revised Civil Statutes.

Defendant, with United States Fidelity and Guaranty Company as surety on its supersedeas bond, perfected an appeal to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas. The constitutional question now before the Court was there urged. That Court submitted to the Supreme Court of Texas the following certified question:

"To the Honorable Supreme Court:

"The above cause is pending in this court on submission. Appellant is a private corporation having its principal place of business in Tarrant County. It was sued by appellees in Comanche County. To this suit it filed its plea of privilege to be sued in Tarrant County, the controverting plea of appellees to this plea of privileges sought to hold the venue in Comanche County under Subdivision 24 of Article 1830, R. S., 1911, the statute in force at the time the pleading was filed. This exceptional provision appears in substantially the same form as Subdivision 23, Article 1995, R. S., 1925. No other exceptional provision was relied upon by appellees to maintain venue in Comanche County. A general demurrer to the controverting plea was overruled and the case tried on its merits, resulting in a judgment in favor of appellees against appellant.

"It becomes necessary, for a correct disposition of the appeal, to determine whether the trial court erred in overruling the demurrer to the controverting plea. It was not (fol. 29) claimed in the plea that appellant had an agency or representative in Comanche County, or that its principal office was situated therein, the claim being only that the cause of action, or a part thereof, arose in that county.

"In the recent cases of *Dublin Mill & Elevator Company vs. Cornelius*, 5 S. W. (2d) 1027, and *Houston Lighting & Power Company vs. Jenkins*, 5 S. W. (2d) 1030, the Honorable Court of Civil Appeals for the Third District, at Austin, held that that portion of this exceptional provision authorizing suits against private corporations in any county in which a cause of action or a part thereof arose involved a discrimination between an individual citizen and the private corporation, and was, therefore,

repugnant to the Fourteenth Amendment of the Constitution of the United States, in that it deprives such corporation of the equal protection of the laws as well as protection of equal laws.

"It is our opinion that a question of so frequent application and general importance should be authoritatively determined by the Supreme Court, and we, therefore, deem it advisable to certify to Your Honorable Court for decision the following question:

"Is that provision of Subdivision 23, Article 1995, R. S. 1925, reading as follows: 'Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or a part thereof, arose,' repugnant to the Fourteenth Amendment to the Constitution of the United States?" (R. 9-11).

However, before the foregoing question was answered, the Supreme Court of Texas upheld the validity of the Statute in question, against the very constitutional objection here urged, in the case of *Grayburg Oil Company vs. Powell*, 15 S. W. (2d) 542. Thereupon the Court of Civil Appeals withdrew its certificate upon the express ground of that decision (R. 11); and by majority opinion (R. 13) denied appellants' contention, thus ruling adversely to it on the constitutional question now before the court for decision.

In their Statement in Support of Jurisdiction under Rule 12 appellants have traced every step of procedure below from the decision by the Court of Civil Appeals to the point of perfecting this appeal. Those procedural steps are necessarily involved in discussing the juris-

diction of this Court, to be submitted in connection with the merits. Since they do not bear on the merits, discussion thereof in detail is here omitted. However the invalidity of the statute in question, upon the grounds here presented, was again urged before the Court of Civil Appeals on rehearing by Bain Peanut Company (R. 22); before the Supreme Court of Texas in petition for writ of error and in motion for rehearing thereon (R. 23-25, 27); and was raised by assignment of error and designation of the point upon which appellants now rely for reversal. (R. 31, 33).

IV.

ASSIGNMENT OF ERROR.

Appellants here rely on their only assigned error, namely:

> "The Honorable Court of Civil Appeals erred to the prejudice of appellants in upholding the constitutionality of the following portion of Section 23, Article 1995, Revised Civil Statutes of the State of Texas, to-wit:
>
> > " 'Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or any part there, arose'
>
> (fol. 69) because said statute as upheld and applied in this case arbitrarily discriminates against appellant, Bain Peanut Company of Texas, a private corporation, by subjecting it to suit in a county other than its domicile in this: That individual and other litigants and classes of litigants than those named in said statute are not subject to suit outside of the

counties of their domiciles upon the ground that 'the cause of action, or a part thereof, arose' elsewhere. Wherefore appellants say said statute violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, and, in its application, deprives appellant Bain Peanut Company of Texas of the equal protection of law to which it is entitled under said constitutional provision as a citizen of the United States." (R. 31).

V.

ARGUMENT.

The privilege to be sued in the county of one's domicile has long been recognized by the Texas Courts as a valuable right,

Christenzen vs. Foster, 297 S. W. 657.

And this Court, in *Power Mfg. Co. vs. Saunders*, 274 U. S. 490, 71 L. Ed. 1165, and *Truax vs. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, held state procedural statutes which arbitrarily discriminated against certain classes of citizens to be within the reach of the Fourteenth Amendment.

Under the facts conclusively found by the Court of Civil Appeals in their certified question to the Supreme Court of Texas, (R. 9-11), the right of plaintiffs below to maintain venue of this suit in Comanche County, Texas, must stand or fall with the validity of the challenged portion of Subdivision 23, Article 1995, Revised Civil Statutes of Texas. That Statute is here set out in full, the challenged portion being in italics:

"23. Corporations and associations. — *Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or a part thereof, arose*, or in which such corporation, association or company has an agency or representative, or in which its principal office is situated. Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law."

The validity of the foregoing statute was first judicially denied in Texas by the Court of Civil Appeals for the Third District in the case of *Dublin Mill & Elevator Company vs. Cornelius*, 5 S. W. (2d) 1027. The opinion in that case argues the invalidity of the statute with such clearness and force that we cannot do better by way of argument than to quote therefrom at length, which we do.

"We have reached the conclusion that the proposition" (challenging the constitutionality of the statute in question) "correctly states the law with regard to the question raised.

"It may be well to again note that the sole and only ground on which appellee sought and maintained venue in Bexar County was that appellant was a private corporation and the cause of action or a part thereof arose in that county. Article 1995 provides as a general rule of venue that no person who is an inhabitant of this state shall be sued out of the county of his residence or domicile, except in certain specified instances not involved here. There is no exception which permits an individual citizen

of Texas to be sued in any county in which a cause of action or a part thereof arose, but subdivision 23 of the article referred to does provide that 'suits against a private corporation, * * * may be brought in any county in which the cause of action, or a part thereof, arose.' So the question to be determined is whether there is any reasonable basis for this discrimination as between an individual and a domestic private corporation with reference to venue for suits on or growing out of their ordinary contracts or torts for damages. We have been unable to find any reasonable basis for this distinction and discrimination. Of course, there may be and are many purposes for which corporations may be reasonably classified and treated differently from individuals, but not so with reference to venue for suits for damages growing out of their respective ordinary contracts or torts. There might also be certain character of contracts of a corporation which would probably furnish a reasonable basis for a distinction as to venue for suit on such contracts; but we have been unable to conceive of any reasonable basis for the classification or distinction made by this statute which applies to all contracts made by any private corporation. It simply authorizes suits against a private corporation in any county in which a cause of action or a part thereof arose on all of its contracts, and at the same time withholds that right with reference to the same character of contracts of an individual. There is no law prohibiting an individual from making the same character of contract made by appellant and involved in this cause. And, generally speaking, the same is true with reference to all contracts which any private corporation may make in this state. So where is the reasonable basis for any discrimination or distinction with reference to venue for suits based upon all such contracts? Appellee

has pointed out no reasonable basis for this distinction or discrimination. Appellant contends that there is no basis for them . And we see no reasonable basis for the Legislature saying to an individual citizen that he does not have to answer for his contracts or torts in any county except that of his domicile, and at the same time saying to a corporate citizen that it must not only answer in the county of its domicile for its contracts or torts, but must also answer for them in any county in which the cause of action or a part thereof arose.

"The constitutionality of this statute as being discriminatory has never been attacked so far as a research of the cases reveals. However, the Supreme Court of the United States, in the recent case of *Power Mfg. Co. vs. Saunders*, 274 U. S. 490-492, 47 S. Ct. 678, 71 L. Ed. 1165, passed upon and held unconstitutional a venue statute which involved a discrimination between a foreign and a domestic corporation, which decision on principle involved and by analogy supports our conclusion that our venue statute, which involves a discrimination between an individual citizen and a private corporate citizen, in the respect pointed out herein, is likewise unconstitutional, as being in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of the equal protection of the laws as well as protection of equal laws. Because we are of the view that the principle involved and the logic of the opinion in Power Mfg. Co. vs. Saunders, supra, apply with equal force to the statute here in question, we quote at length from that opinion as follows:

> "'Thus the statutes were applied as permitting the defendant, a foreign corporation doing business in one county, to be sued in another county, where it did no business and had no office, offi-

cer or agent, on a cause of action which arose n the former. * * *

"'It is conceded that the statutes neither permit a domestic corporation to be sued in a county in which it does no business and has no office, cfficer or agent, nor permit a natural person to be sued in a county in which he does not reside and is not found. * * *

"'We think it very plain that the statutes discriminate against foreign corporations and in favor of domestic corporations and individuals, and that the discrimination is not theoretical merely, but real and substantial.

"'The clause in the Fourteenth Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws, * * * and extends as well to corporate as to natural persons. * * * It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. * * *

"'No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.

> " 'Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. * * * So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference.'
>
> "It is true that that court was only construing venue statutes involving a discrimination between a foreign and a domestic corporation; still the language used clearly indicates that the court would have held the same with reference to venue statutes involving a discrimination between a foreign or domestic corporation and an individual. At least a careful reading of the opinion will justify the conclusion that the court intended to indicate it would hold all discriminatory venue statutes unconstitutional whether discriminatory as between foreign and domestic corporations, or as between foreign or domestic corporations and individuals."

The Supreme Court of Texas expressly overruled the case just quoted from in *Grayburg Oil Company vs. Powell*, 15 S. W. (2nd) 542, but a comparison of the two opinions clearly discloses that the Court of Civil Appeals has the better of the argument from the standpoint of logic and affirmative reasoning. The Supreme Court of Texas fails to advance an affirmative argument supporting the validity of the statute, but bases its decision solely upon the ground that this Court's opinion in *Power Manufacturing Company vs. Saunders*, 274 U. S. 490, 71 L. Ed. 1165, does not necessarily condemn an attempted discrimination against corporations as a class by striking down the Arkansas venue act which did discriminate against foreign corporations with respect to venue.

While the opinion in the Power Manufacturing-Saunders case confines the *decision* to the effect of an attempted discrimination against foreign corporations by a venue statute which accorded more favorable treatment to domestic corporations and resident individuals, yet we do not believe it was intended thereby to restrict an application of the legal principles there announced to such narrow limits. The Supreme Court of Texas in the Grayburg Oil Co.-Powell case correctly says:

> "Our statute, Subdivision 23 of Article 1995, R. C. S. * * * covers by its terms all private corporations, associations or joint stock companies, be they foreign or domestic." (15 S. W. (2d) 542).

But it fails to point out wherein the privilege of being sued in the county of one's residence is pertinent to the status of an individual citizen, or wherein the burden thereby cast upon private corporations, associations and joint stock companies is pertinent to their status or to any of their inherent characteristics. It advances no reason why those litigants having claims or fancied claims against private corporations, associations or joint stock companies should be preferred over those having similar claims against individual citizens by being accorded more favorable venue of their suits. Nor does our Texas Supreme Court advance—nor do we think any court could have advanced—any justification for the obvious discrimination complained of which can sustain it under the test of permissible classification heretofore often laid down by this court. In short, the attempted classification which now concerns us does not, as it must to be valid, "rest on differences pertinent

to the subject in respect of which the classification is made."

In the case of *Southern Union Life Insurance Company vs. Pesek*, 22 S. W. (2d) 1090, the Court of Civil Appeals at San Antonio, while yielding to the authority of our Supreme Court on the venue question under discussion, vigorously dissented from the soundness of the Supreme Court's conclusions that said statute is a valid enactment. Thus appellant's criticism of our Supreme Court's conclusion appears to rest upon a more solid foundation than the dissatisfaction of a defeated litigant.

We see no escape from the conclusion that the statute in question violates the equal protection clause of the Fourteenth Amendment, according to our understanding of the principles announced in the case of Power Manufacturing Co. vs. Saunders, supra. Our views of that case are fully expressed by the Austin Court of Civil Appeals in Dublin Mill & Elevator Co. vs. Cornelius, supra, and we can add nothng to what is there said.

We cite and shall briefly discuss the following additional authorities:

Kentucky Finance Corp. vs. Paramount Auto Exchange Corp., 262 U. S. 544, 67 L. Ed. 1112.

Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389, 72 L. Ed. 927.

Liggett Co. vs. Baldridge, 278 U. S. 105, 73 L. Ed. 204.

Frost vs. Corporation Commission of Oklahoma et al., 278 U. S. 515, 73 L. Ed. 483.

Corporation Commission of Oklahoma et al vs. Lowe, ...U. S. ...., 74 L. Ed. 517.

In the first case a Kentucky corporation sued a Wisconsin corporation in replevin for an automobile in the Circuit Court of Milwaukee County, Wisconsin. The defendant filed and the trial court allowed a motion requiring plaintiff to bring into Wisconsin at a place designated in the order all of its corporate books and records pertaining to the transaction. Plaintiff refused to comply and the case was dismissed under the Wisconsin statute. The questioned statute provided that a resident defendant, corporate or individual, could be required to submit to such examination only in the home county regardless of the place of suit; that a non-resident individual could not be required to submit to such examination at all unless personally served within the State, while a foreign corporation was required to submit to such examination in any county in the state fixed by order of court having jurisdiction of the suit. It was primarily upon the discrimination as between *non-resident individuals* and *non-resident corporations* that the statute was held unconstitutional. We quote from the opinion at page 1116:

"No doubt a corporation of one state, seeking relief in the courts of another, must conform to the prevailing modes of proceeding in those courts, and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see Canadian Northern R. Co. vs. Eggen, 252 U. S.

553, 561, 64 L. Ed. 713, 716, 40 Sup. Ct. Rep. 402); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact, *and not laid on other suitors in like situations.* Here the statute authorized the imposition, and there was imposed on the plaintiff a highly burdonsome requirement *because of its corporate origin, a requirement which under the statute, could not be laid on an individual suitor in the same situation.* The discrimination was essentially arbitrary. *There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Wilwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case.*" (Italics ours.)

The last sentence of the quoted paragraph indicates clearly that the fact that plaintiff was a non-resident corporation was wholly incidental and not material, the test applied in holding the statute invalid being that with respect to venue a corporation and an individual similarly situated must be accorded identical treatment.

In the case of Quaker City Cab Company vs. Pennsylvania, the statute involved laid an occupation tax upon corporations, whether foreign or domestic "owning or operating any device for the transportation of passengers." Incidentally plaintiff in error was a New Jersey corporation doing business in Pennsylvania. It was subject to competition by individuals engaged in the same business; but individuals and unincorporated associations engaged in that business were not subject to the tax; nor were they subject to any similar tax designed to equalize the burden as between such owners

and corporate owners engaged in transporting passengers. The sole basis of discrimination rested in the distinction between individual and corporate ownership. The Court said:

> "The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is *imposed merely because the owner is a corporation*. The discrimination is not justified by any difference in the source of the receipt or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation." (Italics ours).

The distinction on which the discrimination was based was not any supposed difference between a foreign and a domestic corporation or a foreign corporation and resident individual of Pennsylvania but that " the tax is imposed merely because the owner is a corporation."

The case of Liggett Company vs. Baldridge involved a Pennsylvania statute that undertook to limit the operation and ownership of pharmacies or drug stores to individuals, and provided that:

> "No corporation, association or co-partnership shall own a pharmacy or drug store unless all the partners or members thereof are licensed pharmacists."

excepting however corporate and partnership owners of drug stores and pharmacies already in being. Incidentally again, the appellant was a non-resident corpora-

tion, but that circumstance is given no further consideration than to mention it as a fact. All corporations, partnerships and associations whether residents or nonresidents were denied the right to own and operate drug stores or pharmacies; and the question of diversity of citizenship or that the complainant was a foreign corporation doing business in Pennsylvania was not even adverted to in connection with the holding of the court that the statute was unconstitutional. That holding was predicated solely upon the unreasonable and arbitrary discrimination against corporations and in favor of individuals with respect to the operation of a legitimate business.

The two Oklahoma corporation commission cases last cited each involve the same statute, and in each instance the parties were respectively resident citizens and domestic corporations of Oklahoma. In the first one the Oklahoma statute, as construed and applied by the corporation commission, was held to discriminate against individual citizens and in favor of corporations and was therefore adjudged invalid because it violated the equal protection clause of the Fourteenth Amendment. We regard it as significant of the correctness of our estimate of the case of Power Manufacturing Company vs. Saunders that it was cited in support of the proposition that the mere difference between individuals and corporations is not sufficient basis for different classifications resulting in a heavier burden on either. None of the four dissenting Justices excepted to the broad proposition so announced, their several dissents being based on their

views that the character of the corporation involved in the case afforded the proper basis for the classification made by the statute and justified the apparent discrimination arising therefrom. The principles recognized and applid in the first of the Oklahoma Corporation Commission cases were again recognized in the second one cited.

If the several classifications attempted in the cases just discussed violated the equal protection clause of the Fourteenth Amendment, we can discern no basis for sustaining the validity of the portion of our venue act here challenged on the same ground.

Appellants therefore respectfully submit their case and pray that it be reversed with appropriate instructions.

B. F. Logsdon,

Counsel for Appellants.

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No. 49

IN THE

Supreme Court of the United States

BAIN PEANUT COMPANY OF TEXAS, ET AL., Appellants,

vs.

DAVE PINSON AND C. B. GUYGER, Appellees.

Appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas.

GIB CALLAWAY
Counsel for ~~Appellants~~ Appellees

CALLAWAY & CALLAWAY
Of Counsel.

No. 669

IN THE

Supreme Court of the United States

BAIN PEANUT COMPANY OF TEXAS, ET AL., Appellants,

vs.

DAVE PINSON AND C. B. GUYGER, Appellees.

Appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas.

STATEMENT CONTESTING THE JURISDICTION OF THIS COURT AND MOTION TO DISMISS APPEAL.

To the Honorable Supreme Court of the United States:

Now comes the Appellees, Dave Pinson and C. B. Guyger, in the above styled and numbered cause, by their counsel of record herein, and move the court to dismiss the appeal in the above entitled cause for want of jurisdiction.

The appellants herein, have not exhausted their remedies provided under the procedure of the State of Texas for relief. The Supreme Court of the State of Texas dismissed the appellants application for writ of error, because the said application was not filed in the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas within 30 days from the overruling of appellants First Motion for Rehearing. The application was properly dismissed by the Supreme Court of Texas for want of jurisdiction, because of such failure to exhaust all remedies, which were open to them to secure a hearing in the Supreme Court of the State of Texas on the question relied on in this appeal.

General Statement of the proceedings below, and the statute applicable thereto, which show from an examination of the face of the record that the applicants did not exhaust all remedies for relief provided under the State Statutes, and that this Court has no jurisdiction on this appeal.

The Jurisdiction of the Supreme Court of

Texas is defined by Article 1728 Revised Statutes 1925, as follows:

"The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the courts of Civil Appeals from final judgment of trial courts:

1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

3. Those involving the construction of the validity of statutes necessary to a determination of the case."

The statutes of the State of Texas, provide (Article 1739-1740 and 1741, R. S. 1925) that before the Supreme Court can review final judgments of the Courts of Civil Appeals a petition addressed to the said Court must be filed with the Clerk of the Court of Civil Appeals, which decided the case within thirty days from the overruling of a Motion for a Rehearing. On

this matter Article 1742, R. S. 1925, reads as follows:

> "The Petition shall be filed with the Clerk of the Court of Civil Appeals within 30-days from the overruling of the Motion for a Rehearing."

The opinion rendered by the Court of Civil Appeals in this case dated July 12th, 1929, shown in the record pp. 34-40, was the opinion rendered on appellants first motion for rehearing. In said opinion, Justice Leslie for the Court uses this language:

> "Appellant's Motion for rehearing will be Overruled." * * * *
>
> "Appellees' Motion for rehearing is, therefore, granted."

It appears therefore that the Court overruled the appellants First Motion for a rehearing theretofore filed, and granted the motion for a rehearing filed by the appellees. This opinion was rendered on July the 12th, 1929, but this opinion made no material change from the original opinion, which was rendered May 3, 1929.

Appellants **Second Motion for a Rehearing** (R. 48-49) was filed on July 27th, 1929. This motion was in all essential particulars like the first. This Motion for Rehearing was overruled by the Court of Civil Appeals on October 18th, 1929 (R. 50). The petition for writ of error to the Supreme Court was filed with the Court of Civil Appeals the 11th day of November, 1929 (R. 55-56) and in the Supreme Court of the State of Texas, on the 14th day of November, 1929.

It will be seen, therefore, that the Court of Civil Appeals rendered its opinion overruling appellants first Motion for a Rehearing on July the 12th, 1929. The appellant did not file its application for a Writ of Error until the 11th of November, 1929, **four months** after the rendition of the opinion by the Court of Civil Appeals overruling the appellants said first Motion for a Rehearing. Article 1742, provides that the petition should have been filed with the Clerk of the Court of Civil Appeals within 30-days from the rendition of the opinion on July the 12th, 1929.

Appellants have not complied, therefore, with the practice of the State of Texas, in this particular, and it is evident from an inspection, of the record that for this omission alone, the Supreme Court of the State of Texas dismissed this case for want of jurisdiction, and not because the Court was without jurisdiction to pass on the case, had this practice act been complied with.

The original opinion rendered by the Court of Civil Appeals in this case and the first motions for a rehearing filed by the appellants and appellees have not been included in the record filed in this Court in this case by the Clerk of the Court of Civil Appeals at Eastland, Texas. But reference to the complete record of this case shows that the Court of Civil Appeals rendered its first opinion on May the 3rd, 1929. The plaintiff in error, The Bain Peanut Company of Texas, filed its original motion for rehearing in the case on the 16th day of May, 1929. This is the Motion overruled by the Court in its opinion rendered July 12th, 1929, from which this appeal is taken. The second motion for a re-

hearing was filed in this Court, as above stated, on July 27th, 1929.

Under the holdings of the Courts of Texas in construing the statutes applicable in this case, the Second Motion for Rehearing should never have been filed and the application for writ of error should have been filed in the Court of Civil Appeals within thirty days from the overruling of their first Motion for a Rehearing on July the 12th, 1929. This was not done. And for this reason, evidently, the Supreme Court of Texas dismissed this case for want of jurisdiction.

Section One, of Article 1728, R. S. 1925, of the State of Texas, provides that the Supreme Court has appellate jurisdiction in cases of the nature of the one here in question where the judges of the Courts of Civil Appeals disagree on any question of law material to the case.

In this case there was a dissenting opinion by Justice Funderburk on several questions of law recited in his dissenting opinion shown at pages (42-47 R.) Certainly had the appellants

complied with the practice act above mentioned the Supreme Court, under the express provisions of the Statute, would have taken jurisdiction.

Under Section 3, of Article 1728, R. S. 1925, the Supreme Court has appellate jurisdiction in cases "involving the validity of Statutes," necessary to a determination of the case. It seems to us that beyond question had the appellant properly invoked the jurisdiction of the State Supreme Court, by complying with the local practice act, it would have secured a hearing in this case.

Under the practice in the State of Texas, the Supreme Court, in dismissing a case for want of jurisdiction, does not, as a general rule, state the grounds for such dismissal. And, in this case, in dismissing the plaintiff's petition for writ of error for want of jurisdiction, (R. 63) the Court does not give any reason for its decision; nor does it give any ground for overruling the Motion for Rehearing on the application for a Writ of Error. (R. 63.) It is evident, however, that the Court followed the line of

decisions on this question holding that the application for Writ of Error must be filed within 30-days from the overruling of the Original Motion for Rehearing. In construing the statute above cited, the Supreme Court of Texas in the cases of Vinson vs. Carter 166 S. W. 363, and Henningsmeyer vs. Bank 195 S. W. 1137, definitely state the rule that the application for writ of error must be filed in the Court of Civil Appeals within 30-days from the overruling of the first Motion for Rehearing.

In Smith vs. Patterson 241 S. W. 113, Justice Powell for the Supreme Court uses this language:

> "Again, it is definitely settled by two very recent decisions of the Supreme Court, in opinion by former Chief Justice Phillips, that petition for writ of error must be filed within 30-days of the overruling of the **original** motion for rehearing. Otherwise a different rule would permit an extension of the time fixed by the statute for the filing of the petition for writ of error simply through the filing of successive motions of the same character." * * *

And in the case of the National Compress Company vs. Hamlin 269 S. W. 1024, in a case very similar in procedural facts to the one here presented, Justice Greenwood for the Supreme Court of Texas again holds that the application for writ of error must be filed in 30-days after the first Motion for rehearing is overruled, and that the filing of the application, within 30-days **after the overruling of a second motion,** is too late.

This record shows that the appellant here has not exhausted his remedies provided under the said procedure for relief, and appellees insist, under the holdings of this Court in such cases, that the appeal herein should be dismissed This Court, in the case of

> Maria Matherson, et al vs. The Branch of the Bank of The State of Alabama, 7th Howard 258, 12th Law Ed 692,

dismissed the writ of error because of the failure of the appellants to comply with the State Practice in seeking a hearing before the Supreme Court of the State of Alabama. A simi-

lar holding was also made in the case of Chappell Chemical Co., vs. Sulphur Mines Co., of Virginia, 43 Law Ed 520, 172 U. S. 472. This holding was also followed in the cases of

Ry. Co. vs. Sealy 248 U. S. 363,

Spokane etc., Water Co., vs. Madison 212 U. S. 565,

Stratton vs. Stratton 239 U. S. 55, 60 Law Ed. 142.

And directly in point, is the very recent case of Marianna Mathews vs. Louis J. Huwe, 70 Law Ed. 266, 269 U. S. 261, in which the court says:

> "Another reason why the motions to dismiss should be granted, even if the foregoing conclusion were wrong, is that the plaintiffs in error, did not exhaust all their remedies for review by the Supreme Court of the state. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made."

These cases, we believe, are clearly against

the jurisdiction of this court where the appellant has not exhausted his remedy in the State court and has not complied with the state practice in seeking to have his case passed on by the Court of last resort in the state from which the appeal is taken.

Appellees respectfully request that the appeal be dismissed for want of jurisdiction.

Respectfully submitted,

Attorney for Appellees.

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